IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 26

JAMES EDMUND GROPPI,

Appellant,

v.

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

REPLY BRIEF

JACK GREENBERG
ELIZABETH B. DUBOIS
10 Columbus Circle
New York, New York 10019

MICHAEL MELTSNER
Columbia Law School
435 West 116th Street
New York, New York 10027

ANTHONY G. AMSTERDAM
Stanford Law School
Stanford, California 94305

HAYWOOD BURNS
112 West 120th Street
New York, New York 10027

THOMAS M. JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

ROBERT E. SUTTON
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203

Attorneys for Appellant

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Appellant submits this brief in order to respond to certain claims made by the State in its brief on appeal. *First,* the State claims that no proper record of community prejudice has been made in the instant case, and therefore defendant has no standing to challenge the Wisconsin Statute denying a change of venue in all misdemeanor cases. *Second,* the State claims that the right to change of venue is only one of several available methods of ensuring an impartial jury trial, and that it is not unusual to condition the right to such protections on the seriousness of the offense. It concludes that the denial of any opportunity for venue in the instant case did not violate due process of law. *Finally,* the State claims that there are significant differences in the treatment accorded felony and misdemeanor defendants in Wisconsin and, therefore, that the limitation of the right to change of venue to felony cases did not violate equal protection

of the law. Appellant submits that these arguments are without merit for the reasons set forth briefly below, and urges the Court to reverse his conviction on the grounds set forth in his brief on appeal.

ARGUMENT

I.

Defendant Has Standing to Challenge the Wisconsin Statute Denying a Change of Venue in Misdemeanor Cases.

As the State's brief concedes, there is no question that WIS. STAT. ANN. §956.03(3), as construed by the state courts in the instant case, absolutely prohibited a change of venue in all but felony cases (Brief for Appellee, p. 5).[1] As a result, the trial court denied defendant's motion for a change of venue without allowing him any opportunity to provide the proof he had proffered as to the "nature and extent" of the news coverage his activities had received, and "its effect upon this community and on the right of defendant to an impartial jury trial." (A.23-25; see Brief for Appellant, p. 8, and pp. 14-15, n. 6). The State con-

[1] WIS. STAT. §971.22 now permits a change of venue in all criminal cases. This section is part of the new Wisconsin Criminal Procedure Code, enacted in 1969, Chap. 255, Laws of 1969. It was effective July 1, 1970, and is applicable prospectively only:

> Section 967.01 TITLE AND EFFECTIVE DATE.
>
> Title XLVII may be cited as the criminal procedure code and shall be interpreted as a unit. This code shall govern all criminal proceedings and is effective on July 1, 1970. It applies in all prosecutions commenced on or after that date. Prosecutions commenced prior to July 1, 1970, shall be governed by the law existing prior thereto.

Chap. 255 represents a broad revision of state statutes dealing with criminal procedure; it repeals WIS. STAT. §§954-964 and substitutes therefor new §§967-976.

tends on appeal that since defendant could have presented evidence of community prejudice on a motion for continuance, on *voir dire* proceedings, or on a motion for new trial, the absence of proof of community prejudice in the record deprives defendant of standing to challenge the statute denying him any opportunity for a change of venue. But the question at issue is whether defendant had a right to prove to the court that only a change of venue could adequately protect his right to an impartial jury trial. Clearly defendant's standing to raise this issue and to show that remedies such as continuance, *voir dire* and motion for a new trial may, under certain circumstances, be inadequate to protect the right to an impartial jury cannot depend on whether he pursued such allegedly inadequate remedies. Nor can it depend on any showing of the attitudes revealed by actual jurors on *voir dire,* as this Court specifically held in *Rideau* v. *Louisiana,* 373 U.S. 723, 727 (1963). Since the trial court denied defendant any opportunity to show that community prejudice was such as to justify a change of venue, on the ground that Wisconsin law would not permit a change of venue in any event, defendant cannot be precluded from challenging the statute's constitutionality because the record fails to show adequate community prejudice. *Mason* v. *Pamplin,* 232 F. Supp. 539, 542-43 (W.D. Tex. 1964), *aff'd, Pamplin* v. *Mason,* 364 F.2d 1, 6-7 (5th Cir. 1966).

II.

Change of Venue Has Traditionally Been Recognized as a Means of Guaranteeing the Defendant's Right to an Impartial Jury Trial and May, Under Certain Circumstances, Be Required by Due Process of Law.

The State contends that change of venue is only one of several possible methods of ensuring an impartial jury and, therefore, is not constitutionally required (Brief for Appellee, pp. 14-18). But apart from continuance and *voir dire,* whose inadequacies are dealt with in appellant's brief at pp. 22-25,[2] the State points specifically only to change of venire, control of media treatment, oath-giving, cautionary instructions, sequestration of jury and protection of witnesses as "devices available to guard against undesirable intrusions into the fact-finding process" (pp. 14-15). Even if such devices are available and used to their maximum potential, change of venue remains essential, under certain circumstances, to guarantee jury impartiality. Thus, as noted at p. 21 of appellant's brief, the American Bar Association's *Report on Standards Relating to Fair Trial and Free Press* (A.B.A. Project on Minimum Standards for Criminal Justice, 1966) found that even with liberalization of the procedural remedies available to defendants, including *voir dire* examination and continuance, and with radical changes in the law governing release of news to and by the press, the availability of change of venue remained vital. Moreover, there is no indication that Wisconsin has initiated any of the reforms

[2] See also, with respect to *voir dire,* WIS. STAT. ANN. §270.17:

Section 270.17. NEWSPAPER INFORMATION DOES NOT DISQUALIFY.

It shall be no cause of challenge to a juror that he may have obtained information of the matters at issue through newspaper or public journals, if he shall have received no bias or prejudice thereby . . .

recommended by the A.B.A. *Report*. Certainly none of the devices mentioned in appellee's brief constitute adequate or even significant protections under Wisconsin law and practice. Change of venire—a device by which the jury panel is summoned from outside the area of intensive news coverage—is not available in Wisconsin, and in any event is useful only in cases where community sentiment is not strong.[3] Nor has Wisconsin apparently undertaken to change in any way the freedom traditionally accorded news media with respect to trial coverage, nor to assert any of the kinds of controls over the release of news to or by the press recommended by the A.B.A. *Report*. Oath-giving and cautionary instructions are obviously even less effective devices than the *voir dire* for getting at jurors' conscious and unconscious prejudices. Sequestration of the jury is rarely used in Wisconsin except in life imprisonment or capital cases;[4] in any event, its effectiveness is limited because it guards only against prejudicial publicity which occurs *after* the trial has begun, it may not screen out strong community feeling, and the inconvenience to the jurors may prejudice them against the defendant.[5]

The State also contends that it is not unusual to condition devices designed to ensure jury impartiality on the seriousness of the offense. But in fact, in Wisconsin, as elsewhere generally, the availability of such devices is

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[3] See A.B.A. *Report* at 137-38; *Note, Community Hostility and The Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 366-67 (1960).

Only a very few jurisdictions provide for change of venire and these also authorize change of venue under similar circumstances. See Note, *supra*, at 365-67; A.B.A. *Report*, p. 137, nn. 159, 160.

[4] See *State* v. *Cooper*, 4 Wis. 2d 251, 89 N.W.2d 816 (1958); Note, *Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430, 479.

[5] A.B.A. *Report* at pp. 140-42.

not limited to felony cases with the *sole* exception of the change of venue statute at issue in the instant case.[6]

The State apparently concedes that virtually all American jurisdictions today provide for a change of venue in all serious criminal cases, regardless of whether they are classified as felony or misdemeanor, arguing only that *in the past* a number of states have limited the change of venue device to felony cases. But as pointed out in the Brief for Appellant, at pp. 31-32 and n. 41, only a few jurisdictions have *ever* so limited change of venue, and the trend has been toward elimination of any such distinction.[7]

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[6] The only distinction made in Wisconsin is for cases involving possible life imprisonment: in such cases additional peremptory challenges are available, and sequestration of the jury is mandatory rather than discretionary. See p. 9, nn. 14, 16, *infra*.

[7] The reference in Brief for Appellee, p. 13, n. 35, to footnote 51 of 33 FORD. L. REV. 498, 507 (1965) as listing eight states which by statute limited change of venue to more serious crimes is misleading. Included among the eight are Maryland, where a distinction is drawn only between capital and non-capital cases, and only in terms of whether the right to change of venue is absolute or depends on a showing of necessity; Massachusetts, where the statute providing for change of venue in capital crimes was held in 1911 not to limit the inherent right to change of venue in all criminal cases; and Pennsylvania, where the right to change of venue in felonies and misdemeanors is distinguished only in terms of the kind of proof required. See Brief for Appellant pp. 31-32, n. 41, for citations and descriptions of relevant statutes and cases. Also included among the eight listed in the Fordham Note are Louisiana, Texas, Vermont and Wisconsin, all of which amended their laws to remove such a distinction. See, LA. CODE CRIM. P. §§621, 622 (1966); TEX CODE CRIM. P. Art. 31.01 (1966); VT. STAT. Tit. 13, §4631 (1969); WIS. STAT. §971.22 (1969).

Appellee also argues that prior to 1946, change of venue was not available in federal practice. However, federal law did provide for a change of venue from one division to another within a single district. 28 U.S.C. §114; see, *e.g.*, *Stroud* v. *United States*, 251 U.S. 15, 18-19 (1919); *United States* v. *Beadon*, 49 F.2d 164 (2nd Cir.), *cert. denied*, 284 U.S. 625 (1931); *United States* v. *Mellor*, 71 F. Supp. 53, 64 (D. Neb. 1946), *aff'd*, 160 F.2d 757 (8th Cir.),

III.

The Distinctions Between the Treatment Accorded Felony and Misdemeanor Defendants in Wisconsin Are Not Adequate to Justify, Under the Equal Protection Clause, Prohibiting a Change of Venue for Those Charged With a Misdemeanor.

The State argues, at pp. 19-21 of its brief on appeal, that conviction of a felony in Wisconsin carries more serious consequences than conviction of a misdemeanor, and that felony defendants have therefore been provided additional procedural safeguards, including the right to change of venue.

The only factors mentioned supporting the claim that a felony conviction carries more serious consequences are length and place of punishment, disfranchisement and social stigma. But this Court, as well as the Wisconsin Supreme Court, has rejected the motion that such traditional distinctions are of any particular relevance in determining what class of criminal defendants should be accorded fundamental procedural protections. See *Baldwin* v. *New York*, 399 U.S. 66 (1970); see generally appellant's brief at pp. 35-36. In any event, on close examination the distinctions alleged fade. Neither length nor place of punishment necessarily determines the degree of a crime in Wis-

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cert. denied, 331 U.S. 848 (1947). Moreover, a number of cases decided prior to 1946 indicate that there was discretion to grant a change of venue generally if the circumstances warranted it. See, *e.g.*, *Young* v. *United States*, 242 F. 788, 792 (4th Cir.) *cert. denied* 245 U.S. 656 (1917); *Lias* v. *United States*, 51 F.2d 215, 217 (4th Cir.), *aff'd per curiam*, 284 U.S. 584 (1931); *Allen* v. *United States*, 4 F.2d 688, 695-98 (7th Cir. 1924), *cert. denied sub nom*, *Hunter* v. *United States*, 267 U.S. 597, *Mullen* v. *United States*, 267 U.S. 598 and *Johnson* v. *United States*, 268 U.S. 689 (1925).

consin. A misdemeanant can be sentenced to state prison for more than a year;[8] a felon can be sentenced to a county jail for less than a year. It is only if the substantive statute fails to provide the place of imprisonment that the length of the sentence affects the place and, therefore, the degree of the crime. WIS. STAT. §959.044, now §973.02; §939.60. Even then length of sentence is not determinative, but instead a variety of complicated factors enter into the decision as to how the conviction should be treated. See generally Lipton, *The Classification of Crimes in Wisconsin*, 50 MARQ. L. REV. 346 (1966); Note, *Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430, 487-89. Also, while Wisconsin's repeater statute does provide for more severe enhancement of punishment for felons than for misdemeanants, it also means, as noted in appellant's brief at p. 37, n. 47, that misdemeanors can bring increased penalties and incarceration in state prison. The fact that conviction of a felony carries the collateral consequence of disfranchisement is hardly significant in light of Wisconsin's statutes providing for the automatic restoration of such civil rights upon satisfaction of sentence. See WIS. CONST. Art. 3, §2; WIS. STAT. §§6.03 (1967); 57.078 (1959). And the social stigma attached to a conviction is not likely to be determined by whether it is officially labelled a misdemeanor or felony but rather by the nature of the crime and the seriousness with which it is treated by authorities. There is then little to justify any conclusion that a felony conviction carries with it more serious consequences than a misdemeanor conviction.

Similarly, there are virtually no significant differences in the procedural safeguards accorded felony and misdemeanor defendants. The only one mentioned by the State is the felony defendant's right to a preliminary hearing.

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[8] See, Note, *Wisconsin Criminal Procedure*, 1966 WIS. L. REV. 430, 488; *Pruitt* v. *State*, 16 Wis. 2d 169, 114 N.W. 2d 148 (1962).

WIS. STAT. §955.18 (1967), *as amended*, WIS. STAT. §970.02 (1)(c), (4), (5), §970.03 (1969).[9] This is hardly too significant, especially in light of the fact that there are procedures guaranteeing a judicial finding of probable cause before a warrant or summons can be issued for a misdemeanant's arrest,[10] and guaranteeing the misdemeanant's right to a prompt trial.[11] With respect to virtually all other procedural protections including the right to jury trial,[12] no distinction is made between felony and misdemeanor. And, most significant, with respect to all protective devices aimed at ensuring a fair and impartial jury, no such distinction is drawn. Thus the law is identical for felonies and misdemeanors with respect to the selection of the jury, including the summoning of jurors, impaneling and qualifications, challenges for cause[13] and peremptory challenges,[14] and with respect to instructions,[15] sequestration,[16] and continuance.

In conclusion, the distinctions mentioned by the State between the treatment accorded felony and misdemeanor defendants in Wisconsin are of minor importance. Fur-

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[9] Prior to 1961 there was no provision limiting the right to preliminary hearing to felony cases. See WIS. STAT. §954.08 (1949).

[10] WIS. STAT. §954.02, 954.025 (1967), *as amended*, §§968.02, 968.03, 968.04, 968.26 (1969).

[11] WIS. STAT. §§970.02 (3), 971.10 (1969).

[12] See Brief for Appellant pp. 15-16, n. 7; Brief for Appellee, p. 5, n. 6.

[13] See generally WIS. STAT. §957.14 (1967), *now* §972.01 (1969); WIS. STAT. §270.16 (1967).

[14] WIS STAT. §957.03 (1967) (4 peremptory challenges allowed in all cases except those involving possible life imprisonment where 12 allowed), *as amended*, WIS. STAT. §972.03 (1969) (same except that in life cases number reduced from 12 to six).

[15] See note 13 *supra*.

[16] WIS. STAT. §972.12 (1969); See also former §957.05 (1967).

ther, when Wisconsin procedures are looked at as whole, it is clear that there is no significant distinction in the treatment accorded misdemeanor and felony defendants, that there is no coherent or consistent principle of classification of crimes, and that a crime's classification is totally unrelated to the reasons that change of venue may be required to vindicate a defendant's constitutional right to an impartial jury. (See generally Brief for Appellant, pp. 34-37.)

Respectfully submitted,

JACK GREENBERG
ELIZABETH B. DUBOIS
10 Columbus Circle
New York, New York 10019

MICHAEL MELTSNER
Columbia Law School
435 West 116th Street
New York, New York 10027

ANTHONY G. AMSTERDAM
Stanford Law School
Stanford, California 94305

HAYWOOD BURNS
112 West 120th Street
New York, New York 10027

THOMAS M. JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

ROBERT E. SUTTON
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203

Attorneys for Appellant